(2)

No. 91-538

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FORSYTH COUNTY, GEORGIA
Petitioner

v.

THE NATIONALIST MOVEMENT
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Should the ruling of the Eleventh Circuit Court of Appeals that a parade license fee of up to $1,000.00 per day violates the First Amendment -- on the grounds that such a charge exceeds a nominal sum -- be reviewed by the Supreme Court?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were the Appellants, Forsyth County, Georgia (Petitioner herein); City of Cumming, Georgia; Forsyth County Board of Education; and, the Appellee (Respondent herein), The Nationalist Movement.

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STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

1. United States Constitution, Amendment I (text set out in Petition for Writ of Certiorari);

2. §3(6), Forsyth County Ordinance No. 34 (text set out in Petition for Writ of Certiorari).

STATEMENT OF THE CASE

Respondent, The Nationalist Movement, a non-profit, pro-majority organization, held a rally and parade in Cumming, Forsyth County, Georgia, in January, 1988, about the courthouse square, to call for pro-majority reforms and to express opposition to the Martin Luther King Holiday. It applied to Petitioner, Forsyth County, Georgia, and others to hold a similar

parade and rally on January 21, 1989. Its affiliate previously held a rally at the Forsyth County Courthouse, in March, 1987, without paying any fees, under order of the United States District Court for the Northern District of Georgia. Petitioner interposed its parade ordinance -- originally adopted in January, 1987, and subsequently amended on June 8, 1987 -- for the January, 1989 parade, requiring up to a $1,000.00 per day fee, to which Respondent objected.

On January 19, 1989, Respondent sought declaratory and injunctive relief against Petitioner, charging that Petitioner's parade ordinance, which allowed the license fee of up to $1,000.00 per day, was facially unconstitutional, in violation of the First Amendment.

The District Court held that the ordinance was not unconstitutional; consequently, the rally and parade were not

held. The ruling was appealed and, on October 2, 1990, reversed by the Eleventh Circuit Court of Appeals on the grounds that an "ordinance which charges more than a nominal fee for using public forums for public issue speech, violates the First Amendment." Nationalist Movement v. City of Cumming, et al, 913 F.2d 885, 891 (11th Cir.1990), cert. den. ___ U.S. ___, Appendix B at 31. On rehearing en banc, the ruling in favor of Respondent was upheld, Nationalist Movement v. City of Cumming, et al, 934 F.2d 1482 (11th Cir.1991), Appendix D, pp. 47-48.

ARGUMENT

REASONS FOR DENYING THE WRIT

PROPOSITION I

1. THIS CASE APPLIES SETTLED LAW.

The Court of Appeals stated that it

was "aided substantially" by Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870 (1943), Appendix p. 30, note 6, which held that government "may not impose a charge for the enjoyment of a right granted by the Federal Constitution," 319 U.S. at 113, 63 S.Ct. at 875. After stating that it had reviewed the more recent Supreme Court cases involving traditional public forums, particularly Central Florida Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515 (11th Cir.1985), cert. den. 475 U.S. 1120, 106 S.Ct. 1637 (1986), the court found "no basis on which to reevaluate" long-standing precedent dating back some fifty years, see Appendix p. 30, note 6.

A doctrine of "long lasting acceptance" is given great weight in the Supreme Court, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 95 S.Ct. 1917 (1975), and, as such, would weigh heavily against the granting of the Writ. Stare

decisis should also be a factor, see e.g. United States v. Rands, 389 U.S. 121, 88 S.Ct. 265 (1967) (as to the latter decision controlling the former), insofar as Murdock, relied upon by Respondent and the Court of Appeals, comes after and interprets Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762 (1941), heavily relied upon by Petitioner.

The Court of Appeals applied constitutional law in terms of "modern free speech cases" and "modern constitutional doctrine," see Central Florida, 774 F.2d at 1522.

Respondent notes that such cases necessarily include Jones v. Opelika, 319 U.S. 103, 63 S.Ct. 890 (1943) (prohibiting license or tax to distribute literature); Follett v. Town of McCormick, 321 U.S. 573, 64 S.Ct. 717 (1944) (striking down a $1.00 per day fee on free speech); and, United States v. Texas, 252 F.Supp. 234

(W.D.Tex.), aff'd 384 U.S. 155, 86 S.Ct. 1383 (1966) (disallowing poll taxes).[1]

Petitioner's emphasis that "the cost of ... protection" motivates its fees,

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[1] Although the Court of Appeals found that a "nominal" fee might pass constitutional scrutiny, Respondent averred below, and repeats here, that any fee is an unconstitutional restraint upon speech, cf. Kunz v. New York, 340 U.S. 290, 293, 271 S.Ct. 312, 314 (1951), or upon constitutionally protected rights; cf. Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079 (1966), Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666 (1937), Martin v. Struthers, 319 U.S. 141, 36 S.Ct. 862 (1943); Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669 (1943); Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276 (1946); Flower v. United States, 407 U.S. 197, 92 S.Ct. 1980 (1972); Papish v. University of Missouri, 410 U.S. 667, 93 S.Ct. 1197 (1973); and, United States v. Grace, 461 U.S. 171, 103 S.Ct. 1702 (1983).

Since the ruling below found the ordinance facially unconstitutional, the court did "not need to inquire whether the particular imposition of a fee ... is unconstitutional," Appendix p. 31, note 10. Therefore, whether a mere nominal fee may be charged is arguably not before the Court. If, however, the Writ is granted, Respondent would argue, alternatively, to uphold the Court below, or, to invalidate any free speech license fee, of any amount, as unconstitutional.

Petition, p. 4, seems but another thinly disguised ruse to abridge First Amendment rights based upon fear of violence. Such issue has, again, long been settled. See, e.g. Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103 (1972); Brandenberg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827 (1969); Terminello v. City of Chicago, 337 U.S. 1, 69 S.Ct. 894 (1949); and, Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940).

Petitioner's attempt to extrapolate Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746 (1989) to a granting of the Writ for the purpose of imposing fees upon free speech is misplaced. Ward does not impose fees on free speech; it allows the volume of music at a public forum to be modulated. Respondent does not dispute such a holding. In fact, in the case of Forsyth County Defense League v. Forsyth County, Georgia, No. C-87-31-G (D.C.N.D.-

Ga.1987), Appendix I, p. 128, the League secured injunctive relief against the County (being the same entity as Petitioner, here) in order to hold a rally; the order of the District Court, with which the League (a later-subsidiary of Respondent) fully complied, provided that the "injunction does not include the right to amplify speeches ... as to disturb the residents and visitors of the convalescent home across the street from the courthouse...."[2]

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[2] It should be noted at this juncture that Petitioner has added materials which were not part of the record, below: Appendices E-G (newspaper clippings), J (purported printed bulletin), K (order from separate court case), L-M (newspaper clippings), P-S (purported minutes of meetings) and U, W (purported printed bulletins), and which should not be considered here. See Corporation Com. v. Cary, 296 U.S. 452, 56 S.Ct. 300 (1935), Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 61 S.Ct. 666 (1941), reh. den. 312 U.S. 715, 61 S.Ct.666 (1941) (record cannot be added to). However, if the Court makes an exception in this instance, or feels that the materials are helpful, Respondent is prepared to argue upon the extraneous matter.

The pretext of "maintaining order" cannot be used, either, for the suppression of speech; again, a rule of long-standing. Hague v. CIO, 307 U.S. 496, 516, 59 S.Ct. 954, 964 (1939) (note that Petitioner terms its parade license fees as "costs of ... policing use of its streets and property by those wishing to express their First Amendment views", Petition, p. 11).

PROPOSITION II

2. EXERCISE OF JUDICIAL DISCRETION WOULD NOT BE BENEFICIAL.

There is a split among the Sixth Circuit and Eleventh Circuits on whether an excess of nominal fees can be charged for First Amendment activities.[3]

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[3] The split is actually between the Sixth and other circuits. Kaplan v. County of Los Angeles, 894 F.2d 1076 (9th Cir.1990), cert. den. 110 S.Ct. 2590 (1990), cited by Petitioner, did not involve speech at the quintessential public forum of a courthouse, as here, but rather a printed, paid, political advertisement in a publication for candidates.

However, issuing the Writ is not a right, but a matter of judicial discretion. Rules of the United States Supreme Court, Rule 10(1) (1990).

The Court may -- and should -- withhold its discretionary hand because the result reached below, as in this case, is right. Here, also, the Court may consider that the Eleventh Circuit Court of Appeals (formerly part of the Fifth Circuit) has a long tradition of dealing with disruptive, tumultuous and contentious public activities and that its decisions are well-respected in the field.

In addition, the rule sought by Petitioner would be chaotic. At present, apparently only two governmental units in the entire nation, Forsyth County, Georgia, and Columbus, Ohio, have deigned to charge fees[4] for First Amendment activity.

[4] Respondent would like Central Florida to be overruled, to the extent, if

The rule change sought by Petitioner could burden or abolish every form of at all, that it may permit the charging of a nominal fee. And, given the opportunity, Respondent would so argue, here. However, since this case does not squarely address the nominality issue -- but rather the issue is whether fees in excess of nominal fees may be charged -- denial of the Writ would offend neither long-standing practice nor precedent.

Respondent would, likewise, wish to overrule the line of authority which holds that regulation of speech must be content-neutral. Content-neutrality seems to have generated a kind of legal fiction, susceptible to misinterpretation and misapplication, with overtones even here.

Surely a conspiracy of sodomites to violate sodomy laws is as offensive to the public morals as a conspiracy of murderers to assassinate the president is to the public safety, notwithstanding that either group may stage a parade as part of its unlawful activities. Government should be empowered to curb both, but not to likewise restrain a march of Boy Scouts to honor the flag nor a parade of Nationalists to revere George Washington's Birthday.

Moreover, Respondents in no way align themselves with Petitioners in Stonewall Union v. City of Columbus, 931 F.2d 1130 (6th Cir.1991), cert. applied for, Docket No. 91-205. Would-be paraders there were homosexuals and their confederates; the practice of homosexuality or

citizen procession -- from Christmas parades and candlelight vigils to political protests and tickertape parades. Under Petitioner's fatally flawed argument, Lindbergh or MacArthur -- or their supporters -- could have been charged for their tickertape parades.

One shudders to think that Berliners would witness the erection of barricades against Americans lawfully and peacefully parading in the streets so soon after they have torn down the same barricades of their own.

CONCLUSION

It would seem that labeling a skunk a cat would have no effect on the odor.

Likewise, it is too late to label a free speech user tax as a "parade application fee" to camouflage its pernicious attack upon the right of free speech.

One wonders -- but not for long -- Would a poll tax have survived being labeled a "ballot box user fee"? No similar window dressing can disguise the instant free speech user tax, however, by incessant insistence that it is not a tax. "It is a license tax ... imposed on the exercise of a privilege granted by the Bill of Rights," Murdock v. Pennsylvania, 319 U.S. 105 at 113, 63 S.Ct. 870 at 875 (1943) (as to the Pennsylvania fee).

Murdock stated the rule ever so forcefully and matter-of-factly that when "the fee is not a nominal one," 319 U.S. 105 at 116-117, 63 S.Ct. 870 at 876, the First Amendment condemns it. Or, even more succinctly: "Freedom of speech, freedom of press, freedom of religion are available ... not merely to those who can pay their own way," Murdock, 319 U.S. 105,

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sodomy is condemned in many jurisdictions as immoral and unlawful. Would-be paraders here are proponents of democracy and majority rule; as such, their methods and goals are traceable, commendably, to the Magna Carta and our Bill of Rights.

at 111, 63 S.Ct. 870, at 874 (emphasis added).

The case at bar is, in addition, a classic rearguing of the propriety of the "heckler's veto," already ruled upon, again and again, in all its many facets, by this Court.

Simply stated, if a citizen and, perhaps, a few of his supporters, are to stand on the courthouse steps or parade to the courthouse, scarcely as much attention and police supervision would be drawn as for a funeral procession, if as much.

But should the speaker or parader be "controversial" -- due to some public stance or speech -- and, thereby, attract threats or significant numbers in opposition, then simply by threatening violence or a rowdy mob, the opposition would cause an increase in police supervision and cost -- to the point that the would-be exerciser of First Amendment rights could not

"afford" the price tag of free speech. Hence, the odious "heckler's veto."

Such oppression and injustice is neither contemplated by the First Amendment nor by the time-honored decisions of this Court, for which reason -- together with those reasons hereinbefore set forth -- Respondent requests that the Writ of Certiorari be denied.

THIS the 26th Day of November, 1991.

Respectfully submitted,

_____
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CERTIFICATE

THIS CERTIFIES that the undersigned has, this day, mailed, postage pre-paid, three true copies of the foregoing Respondent's Brief in Opposition to Robert Stubbs III, Attorney for Petitioner, at 110 Old Buford Rd., #200, Cumming, Georgia 30130.

THIS the 26th Day of November, 1991.

RICHARD BARRETT